No. 13105

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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RAYMOND W. CLAWSON,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## BRIEF OF APPELLEE.



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### I.
### Jurisdiction.

Appellant was charged in an Information with the failure to file an individual Income Tax Return under the Internal Revenue Code, Section 145(a) of Title 26, United States Code. The District Court had jurisdiction under Section 3231 of new Title 18, United States Code. The offense was committed in the Southern District of California. Judgment was entered against the appellant on May 21, 1951, and on the same day Notice of Appeal was filed. This Honorable Court has jurisdiction under Sections 1291 and 1294 of Title 28, United States Code.

## II.

## Statutes Involved.

Section 145(a) of Title 26, United States Code, provides, in part, as follows:

> *"Failure to file Returns.* Any person required under this chapter * * *, or required by law or regulations made under authority thereof to make a return * * * who wilfully fails to * * * make such return * * * at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor, and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, * * *."

Section 51(a) of Title 26, United States Code, provides, in part, as follows:

> *"Individual Return*
>
> "(a) Requirement—Every individual having for the taxable year a gross income of $500 or more shall make a return * * *."

## III.

## Statement of the Case.

An Information was filed against the appellant in the United States District Court for the Southern District of California, Central Division, on March 14, 1950 [C. R. 1],[1] charging that appellant had failed to file an Individual Income Tax Return for the year 1946 as required by law. Appellant was arraigned and entered a plea of not guilty,

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[1]The references "C. R." are to the clerk's transcript on appeal; the references "R." are to typewritten transcript testimony on appeal; the references "Ex." are to exhibits.

and thereafter a jury trial was had resulting in a verdict of guilty as charged [C. R. 31]. After denying appellant's Motions for Acquittal and for New Trial [C. R. 36], the Trial Judge on May 21, 1951, sentenced appellant to imprisonment in an institution of the jail type for a period of one year [C. R. 37].

## IV.

## Statement of Facts.

The appellant, in November, 1943, negotiated for and purchased a restaurant known as "Kalis" [R. 276, lines 14-20; 277, lines 3-23; 278, lines 3-6 and 21-25; Ex. 3-D-2, 40, 49-B], for the sum of $11,000 [R. 532, lines 22-24; 533, lines 14-16; 608, lines 8-11; 638, lines 17-19; 640, lines 5-9], making a down payment of $5,300, which he received from his wife, but which was really his money [R. 640, lines 12-14], the balance of $5,700 to be paid in monthly installments [R. 41, lines 19-25; 44, lines 8-17; Ex. 49-C]. Appellant concealed his ownership of the restraurant and liquor license by putting them in the name of Waldemar Johanson, his stepfather [R. 534, lines 5-13; 543, lines 18-25; 607, lines 13-16], because he had been convicted of a felony [R. 637, line 25; 638, lines 1-10].

In February, 1944, appellant organized a corporation under the laws of the State of California under the name of "Clawson Enterprises, Inc." The first and only directors and officers were: Appellant Raymond W. Clawson, President and Director; Kathleen Clawson, Vice President and Director; Charles E. Hicks, Secretary and Treasurer; Waldemar Johanson, Director [Ex. 1-B]. In the application to the Commissioner of Corporations for the State of California for the issuance of stock, Charles

E. Hicks, under oath, represented that he was the owner of the restaurant equipment which was being transferred to the corporation for 117 shares of stock [Ex. "E" attached to Ex. 1-B]. The inventory list of the equipment attached to the said application is a carbon copy of the list of the equipment purchased by the appellant, Raymond W. Clawson, in November, 1943 [R. 637, lines 18-19; 643, lines 17-22; Ex. D attached to Ex. 1B, Ex. 49E]. Appellant put the 117 shares of stock in Mr. Hicks' name for the reason that he did not want to have an attachment against him [R. 641, lines 17-23]. Mr. Hicks did not pay for, or claim to be the owner of, the 117 shares of stock, but was holding the stock in his name for the appellant [R. 220, lines 14-25; 229, lines 20-22; 230, lines 3-4 and 5-12]. Although one share each was issued in the name of appellant, Raymond W. Clawson, Waldemar Johanson and Kathleen Clawson, the stock was never delivered to them but remained in the stock book [Ex. 18]. The 120 shares of stock were paid for by the transfer to the corporation of the restaurant equipment owned by the appellant [Ex. 10, Acct. No. 1200—Assets]. The appellant was the owner of all of the assets of the restaurant, and he operated it as a corporation [R. 332, line 1; 707, lines 11-16].

Subsequently, in March, 1946, all of the assets of the corporation were sold for $40,000 cash, at which time the corporation ceased to do business and no further Board of Directors meetings were held [R. 150, lines 20-25; 401, lines 14-15, 19-21; Exs. 10, 11, 23, 24, 36, 37, 41-B]. However, the appellant used some of the cash for his personal uses, drawing checks upon the corporation bank account paying his rent, life insurance, clothing, hotel bills and the like, having drawn between May and December of 1946 for these purposes the amount of $11,212.05 [R.

625-636; 699, lines 9-23; 700, lines 1-2 and 19-23; Ex. J-2].

A part of the $40,000 which was received from the sale of the assets of the corporation was used by the appellant as follows:

$9,500 for the purchase of the yacht, "ARTEMUS" in March, 1946 [R. 697, lines 2-18; Exs. 8-A, 8-B];

$8,782.60 for improvements on the yacht [R. 60-75; Exs. 25, 26, 27 and 28];

$12,000 to his ex-wife, Phyllis Clawson, to purchase a home and furniture [R. 481, lines 1-11; 556, lines 18-25; 557, line 1; 580, lines 12-15].

Appellant was the owner of the yacht ARTEMUS although it was in his wife's name [R. 27]. In September, 1946 he sold the yacht ARTEMUS for $57,750, and had the checks made payable to himself, explaining that the yacht was in his wife's name for business reasons [R. 26, lines 10-11; 31, lines 18-23; 334, lines 1-9; 335, lines 8-10; Exs. 33-A, 33-B and 34]. A part of the $57,750 was used by the appellant as follows:

$16,750 for the purchase of the yacht CONQUEROR in November, 1946 [R. 597, lines 1-11];

$8,000 to pay off personal loans to the Sunset and Vine Loan Co. [R. 82, lines 20-25; 574, lines 1-5; 699, lines 9-23; Exs. 31-B, 50-A, B, C];

$11,000 to pay off personal indebtedness to the Auto Finance Co. [R. 102, lines 13-25; Exs. 9-A, C, 31-C, 38, 39-A-C];

$8,000 to pay off personal indebtedness to Markwell and Co. [R. 107-120; Exs. 29A-1, 30].

The appellant being the actual owner of all the outstanding stock of the corporation [R. 332, line 1; 707, lines 11-16] received from the sale of the assets of the corporation in the nature of constructive dividends the sum of $24,416.66 in the year 1946 [R. 388, lines 14-15; 389, lines 7-8], and from the sale of the yacht ARTEMUS $20,377.35, as a long term capital gain, making a total of $44,794.01, and divided upon the community property basis, income in the amount of $22,397.01 for the year 1946 [R. 390, lines 13-20; 418, lines 9-19]. The appellant admitted that although he was aware of the requirement to file an income tax return [R. 622, lines 14-19; 691, lines 12-21] he did not file one for the year 1946 although his gross income was in excess of $500 [R. 620, lines 6-7; 622, lines 14-19; 691, lines 12-21].

## V.

## Questions Involved.

1. Did the appellant have a gross income of $500 or more for the taxable year 1946?
2. Was the money which was withdrawn from the corporation bank account by the appellant, and used by him, a constructive dividend?
3. Was the profit from the sale of the yacht ARTEMUS income to the appellant?

## VI.

## Summary of Argument.

The appellant seeks appellate review upon the statement of facts unwarranted by the evidence as adduced in the trial court. His entire argument is therefore predicated upon his erroneous statement of the facts and should be disregarded. The Government's argument is predicated upon a recital of the facts established by the direct evidence. The lower court gave proper and adequate instructions to the jury. In brief, the jury was instructed that they must consider all of the evidence in determining whether the appellant had a gross income of $500 or more for the taxable year 1946 and whether he wilfully failed to file a return. The verdict of the jury is amply supported by the evidence.

## VII.

## ARGUMENT.

### A.

### There Is Sufficient Evidence to Support the Verdict.

The Government's Statement of Facts, *supra,* is a recital based upon the direct evidence adduced at the trial. The facts as stated are those which the jury were entitled to believe and find. Upon appeal the court must view the facts, including not only direct evidence but also all references reasonably and justifiably to be drawn therefrom, in the light most favorable to the Government. The appellant's view of the evidence may not be considered because it was rejected by the jury. We, therefore, submit that the appellant's Statement of Facts must be disregarded on appeal. The only question on appeal with regard to evidence is whether there is any substantial

evidence to support the verdict. There was ample evidence of the crime to support the jury's verdict. The appellant was the sole owner of all the equipment transferred to Clawson Enterprises, Inc., a corporation, for 120 shares of its capital stock. He owned all the outstanding shares of capital stock and had complete control of the corporation. The corporation served no real business purpose except as a passive dummy and mere instrumentality of the defendant. In civil tax cases it has been held that the Government may look at the actualities, and upon determination that the form employed for doing business is unreal, may disregard the fiction. It is the command of income and its benefits which indicates the real owner of property. See:

*Lucas v. Earl,* 281 U. S. 111;

*Gregory v. Helvering,* 293 U. S. 465, 469;

*Higgins v. Smith,* 308 U. S. 473, 477, 478;

*Griffith v. Commissioner,* 308 U. S. 355, 357, 358;

*Harrison v. Schaffner,* 312 U. S. 579, 580;

*Commissioner v. Smith* (2 Cir. 1943), 136 F. 2d 556, 559;

*Pacific Magnesium v. Westover* (9 Cir.), 183 F. 2d 584.

In order to sustain the verdict of guilty, all that is necessary is that the appellant have a gross income of $500 and that he wilfully failed to file a return. The appellant contends that the Revenue Agents made only a partial investigation, and that they treated the appellant as the *alter ego* of the corporation. The record completely refutes the appellant's contention [R. 349, lines 19-25; 350, lines 1-4; 388, lines 9-15; 389, lines 7-9 and 18-19; 390, line 13].

The Revenue Agents inspected the books and records incidental to their investigation in order to determine whether the corporation had an earned surplus in 1946 [R. 420, lines 23-24; 422, lines 15-23]. The evidence disclosed an earned surplus of at least $24,416.66 which was withdrawn by the appellant as a constructive dividend to the sole shareholder [R. 388, lines 9-15; 389, lines 7-9 and 18-19; 390, line 13]. It is clear, contrary to appellant's contention, that the books of Clawson Enterprises, Inc., did not show that it borrowed any money [R. 171, lines 4-16; 394, lines 1-5; 395, lines 9-13; Exs. 10, 11], and the appellant's contention that the Revenue Agent should have considered personal loans in arriving at the earned surplus of the corporation, is without merit. The cases on which the appellant relies are not in point and need not be discussed.

In the case of *Currier Lumber Co. v. United States* (1st Cir.), 166 F. 2d 346, the facts were very similar to those of this case, and the court considered the precise question of fact which was raised here. In that case Currier was the President, Treasurer, Director and owner of 75 per cent of the stock. The balance of the 25 per cent of the stock was in his wife's name. He deposited in his personal account checks payable to the corporation received in payment of merchandise sold by the corporation.

The court found that an essentially individual ownership was being run in corporate form and that Currier received constructive dividends which he was under no obligation to repay, and was sufficient to uphold the con-

viction under Section 145(b) of Title 26, United States Code, for attempting to evade and defeat the taxes by filing a false income tax return.

Since the government, in the instant case, predicates a part of its case upon the constructive dividend theory, and the jury having found appellant guilty, it is sufficient in itself to uphold the conviction. The monies which he withdrew from the corporation bank account for his personal uses were not secured by a note, or otherwise. At the time he withdrew the money the corporation had a substantial surplus, and there was no evidence that appellant was obligated to make repayment. From these facts the jury had the right to conclude that the money which appellant took from the corporation bank account was rightfully his. See *Chan Shing Ho v. United States* (C. C. A. 9, 1951), 186 F. 2d 574.

In the civil tax case of *Clark v. Commissioner of Internal Revenue,* 84 F. 2d 725, where profits of a corporation were transferred by direction of a sole stockholder to a trust created for his children, the court quoted the decision of the Tax Court with approval, said:

> "He enjoyed the use of the property, having it transferred for his own purposes. This was the use he wanted to make of the property. He would have enjoyed it no more had it been distributed to him directly."

In addition to the constructive dividend the appellant derived a profit in the amount of $20,377.35 from the purchase and sale of the yacht ARTEMUS in the calendar

year of 1946 [R. 390, lines 16-18]. Either one of these items of income standing alone is sufficient to support the jury's finding of guilty. See: *Stillman v. United States,* 177 F. 2d 607, 616.

## B.

## No Abuse Shown in Denying Appellant's Motion for Bill of Particulars.

Appellant's contention that the denial by the court of his Motion for a Bill of Particulars was error, is without merit. The Information specifically states that the appellant had received gross income of $22,397.01 during the taxable year 1946, and it fully advised him that he had not filed a return having a gross income in excess of $500. By reason of the transactions in receiving moneys from the corporation and profit from the sale of the yacht ARTEMUS, the appellant was in possession and had knowledge of the information concerning his gross income. No error was committed by the action of the court below in this case since the granting of a Bill of Particulars is a matter of discretion of the trial court. See: *Himmelfarb v. United States* (9 Cir.), 175 F. 2d 924, 934-935, cert. den. 338 U. S. 860; *Maxfield v. United States* (9 Cir.), 152 F. 2d 593; *United States v. Kushner* (2 Cir.), 135 F. 2d 668, cert. den. 320 U. S. 212; *O'Connor v. United States* (9 Cir.), 175 F. 2d 477, 478; *United States v. Chapman* (7 Cir.), 168 F. 2d 997, 999, cert. den. 335 U. S. 853; *Morandy v. United States,* 170 F. 2d 5 (9 Cir.), cert. den. 336 U. S. 938; *Stillman v. United States* (9 Cir.), 177 F. 2d 607, 615.

## C.

## No Prejudice Has Been Established in Denying Appellant's Motion for Return of Property and to Suppress Evidence.

The appellant filed a motion on day of trial to suppress the evidence claimed to have been unlawfully seized; there was no showing that he did not have an opportunity to make the motion before trial, as required by Rule 41(e) of the Federal Rules of Criminal Procedure. The burden of showing prejudice resulting from the denial of such a motion is upon appellant. See: *Goldstein v. United States* (C. A. 8, 1933), 63 F. 2d 609, 614; *Mansfield v. United States* (C. A. 8, 1935), 76 F. 2d 224, cert. den. 296 U. S. 601. Nor did appellant make any legal showing, as required by Rule 41(e), that the evidence was unlawfully seized. Furthermore, during the trial it developed that the books and records were those of the corporation and were voluntarily submitted to the Revenue Agents [R. 332, lines 14-17; 340, lines 23-24]. Therefore, there is no merit to appellant's contentions.

## D.

## The Court Did Not Err in Permitting the Introduction of Certain Evidence.

The appellant, without argument, calls upon the court to examine for itself the specifications of error under D(a) to (e) inclusive and to decide from that examination that the matters therein specified are grounds for reversal of the conviction (App. Op. Br. 20). Since the appellant has not seen fit to point out wherein he has been prejudiced, we do not deem it necessary to comment upon these grounds. See: Rule 20(2)(d); *Ziegler v. United States* (9 Cir.), 174 F. 2d 439; *Mosca v. United*

*States* (9 Cir.), 174 F. 2d 448. We submit that as to each unargued specification of error, there is no merit and that the examination of the record will not disclose any reversible error.

## E.

## No Resulting Prejudice Has Been Established by Appellant.

Likewise, the appellant, without argument or citation of authority in Point E does not point out prejudicial error in support of his contention. This specification needs no argument, and is without merit.

## F.

## Appellant Was Not Denied Due Process.

The appellant's contention that where testimony is ostensibly introduced on the theory of *alter ego* and then abandoned, it was prejudicial finds no support in the record or in law, appellant having cited no authority for this proposition. The jury, which had exclusive power of drawing the necessary inferences from the evidence before it and determining the ultimate facts, was fully justified in reaching the verdict that appellant was guilty as charged in the Information.

## G and H.

## The Court Acted Properly in the Instructions Given and Refused.

Examination of the Instructions actually given to the jury discloses that every material proposition of law was given by the court in its Instructions. The specific Instructions refused were either not proper statements of law supported by the facts or they were covered by other

Instructions. Under the Instructions given by the court, the burden of proof was on the Government to establish, beyond a reasonable doubt, that the appellant, during the time alleged in the Information, was a person required to make a return for the year of 1946; had a gross income of $500 or more, and that the failure to file a return was wilful [R. 810, lines 1-20; 816, lines 3-22; 817, lines 8-20; 821, lines 12-19; 823, lines 17-21; 824, lines 1-21]. The jury found against the appellant. The court thereby afforded appellant all the protection, and more, which he sought by the Instructions requested and refused. See: *Murdock v. United States,* 290 U. S. 389, 395; *United States v. McCormick* (C. C. A. 2d), 67 F. 2d 867, cert. den. 291 U. S. 662, 26 U. S. C. 145(a).

## I.

## The Motion for New Trial Was Properly Denied.

We have already commented on appellant's contention as to violation of his rights, and it is without merit.

## J.

## The Court Did Not Err in Admitting in Evidence the Hospital Record of Sarah Names.

The hospital record was admissible to rebut the appellant's testimony that his grandmother Sarah Names was a woman of wealth. The document is a public record made in the usual course of business. It was signed by the deceased, Sarah Names [R. 731, line 25; 732, lines 1-4]. Its weight was for the jury (28 U. S. C. 1732). Questions of rebuttal testimony are within the sound discretion of the trial judge. See: *United States v. Riccardi* (C. C. A. 3d), 174 F. 2d 883, 890; *Williams v. United States* (C. C. A. 4th), 151 F. 2d 736, 737.

## K.

## The Sentence Was Not Excessive.

Under Section 145(a) of Title 26, United States Code, the failure to file a tax return is a misdemeanor, and the maximum penalty is one year, or a fine of $10,000, or both. It cannot be said that the sentence, without a fine, is excessive.

## VIII.

## Conclusion.

There was substantial evidence that the appellant had a gross income of at least $500 for the year 1946, and that he wilfully failed to file a return. The District Court gave proper instructions, and the verdict is amply supported by the evidence. The Judgment should be affirmed.

Respectfully submitted,

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